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Supreme Court, U.S.
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Docket No. 10-406

In the Supreme Court of the United States

Louise Root,

Petitioner,

v.

County of Fairfax, Pameal Schmoll, Michel Bodart, Sue Gilbert & John Colwell,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Fourth Circuit correct in affirming the determination of the United States District Court for the Eastern District of Virginia that Louise Root was not denied procedural due process?

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STATEMENT OF THE CASE

On December 13, 2004, Fairfax County, Virginia (County), Animal Control Officers seized seventeen (17) of Louise Root's (Root) dogs and petitioned the Fairfax County General District Court (general district court) "pursuant to [Va. Code Ann.] § 3.1-796.115(A),[1] for a hearing to determine whether the animals 'had been abandoned, ha[d] been cruelly treated, or [were] suffering from an apparent violation of [Chapter 27.4, Comprehensive Animal Laws] that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.'" [J.A. at 6 ¶ 4.][2] Similarly, on December 15, 2004, County Animal Control Officers seized one horse from Root and petitioned the general district court for a hearing pursuant to Va. Code Ann. § 3.1-796.115(A) (Supp. 2004). [J.A. at 7 ¶ 5.]

Pursuant to Va. Code Ann. § 3.1-796.115(A), a hearing was held in the general district court on December 22, 2004, to determine whether the animals had been abandoned, had been cruelly treated, or had not been provided with adequate care.[3] After the hearing, the "general district court

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[1]Va. Code Ann. § 3.1-796.115 was repealed by 2008 Va. Acts, ch. 510, and is now Va. Code Ann. § 3.2-6569 (2008).

[2]Citations to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit are cited as "J.A. at [page number]."

[3]While proceedings pursuant to Va. Code Ann. § 3.1-796.115 are civil in nature, the County is represented by the Commonwealth's Attorney and the burden of proof is beyond a reasonable doubt. Va. Code Ann. § 3.1-796.115(C) (Supp. 2004).

ordered, *inter alia*, that seven (7) of the dogs be returned to Root and that the remaining ten (10) animals be 'made available for adoption immediately.'" [J.A. at 7 ¶ 6.] The general district court continued the matter until January 19, 2005, for a review hearing for the "court to determine, *inter alia*, 'if progress has been made with the adoptions . . . .'" *Id.* An order to this effect was entered on January 4, 2005, and the court purported to vacate it on December 15, 2005, for unknown reasons. *Id.* Root alleged that the general district court did not enter a final order in the case until February 22, 2006, from which Root appealed to the Fairfax County Circuit Court (circuit court) pursuant to Va. Code Ann. § 3.1-796.115(C). [J.A. at 7 ¶¶ 7-8.]

On July 6, 2006, a bench trial was held in the circuit court, after which the court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'" [J.A. at 8 ¶9.] No order reflecting the circuit court's ruling was ever entered. [J.A. at 8 ¶10.]

After more than nine months, on March 20, 2007, Root's then-counsel filed a motion requesting a new trial on the grounds that Root had not knowingly and voluntarily waived her right to a trial by jury. [J.A. at 8 ¶11.] At the hearing on Root's motion for a new trial, the Commonwealth's Attorney moved for a nonsuit, which was granted by the circuit court without objection from Root's counsel, and an order nonsuiting the case was entered on April 16, 2007. [J.A. at 8 ¶12.]

On April 22, 2008, Root filed a Complaint in the circuit court against the County and eight individuals, including Pamela Schmoll (Schmoll),[4] Michel Bodart (Bodart), Sue Gilbert (Gilbert), and John Colwell (Colwell). [J.A. at 5-11.] In her Complaint, Root alleged that because the County never obtained a final judgment order of forfeiture to the nine dogs and one horse, title did not vest in the County and, therefore, the adoptions were void. [J.A. at 9 ¶ 15-16.] In Count I of her Complaint, Root sought an injunction pursuant to Va. Code Ann. § 8.01-620 (2008) ordering the return of the nine dogs and one horse to her. [J.A. at 9 ¶ 18.] In Count II of the Complaint, Root asserted a cause of action under 42 U.S.C. § 1983, claiming that the County had deprived her of due process under the Fourteenth Amendment to the United States Constitution by retaining and adopting out the nine dogs and one horse without acquiring title. [J.A. at 9 ¶ 22.] Root sought damages in the amount of $300,000 from the County as well as costs and attorney's fees. [J.A. at 10.]

On May 14, 2008, Root filed a motion to nonsuit defendants Michelle McCall, Dianne Lanigan, and Sheila Reilly.

On May 16, 2008, the County removed Root's Complaint to the United States District Court for the Eastern District of Virginia, Alexandria Division (District Court).

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[4]Schmoll's first name is correctly spelled Pamela, not Pameal.

On June 13, 2008, the District Court granted the County's motion to dismiss Count II pursuant to Fed. R. Civ. P. 12(b)(6). The District Court denied the motion to dismiss Count I pursuant to Fed. R. Civ. P. 12(b)(6) filed by the County, Colwell, Schmoll, and Bodart, and instead remanded it to the circuit court. On June 19, 2008, the district court entered an order dismissing Count II and remanding Count I to the circuit court.

On July 2, 2008, Root appealed the District Court's dismissal of Count II to the United States Court of Appeals for the Fourth Circuit (Fourth Circuit). [J.A. at 33.] On July 16, 2008, the County, Schmoll, Bodart, and Colwell cross-appealed the remand of Count I to the Fourth Circuit.

In an unpublished opinion dated March 26, 2010, the Fourth Circuit affirmed the District Court's order. The Fourth Circuit found that "the procedural due process given to Root was adequate." [App. at 4a.][5]

REASON FOR DENYING THE PETITION

To provide procedural due process, a government entity generally cannot deprive a person of his or her property without first providing him or her with notice of an impending deprivation and an opportunity to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). These requirements of notice and opportunity to be heard are interrelated.

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[5]Citations to the Appendix filed as part of Root's Petition are cited as "App. at [page number]."

As this Court has explained, the "right to be heard has little reality or worth unless one is informed that the matter [affecting one's property rights] is pending and can choose for himself [or herself] whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In deciding whether a person has received sufficient notice and an adequate opportunity to be heard, "courts must consult the entire panoply of predeprivation and post-deprivation" remedies provided to the person by a government entity in the particular case. *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990). Contrary to Root's argument at page 15 of her Petition, as more fully explained below, Root was given the opportunity to be heard, was in fact heard, and was able to present her objections to the seizure of her animals pursuant to Va. Code Ann. § 3.1-796.115, after which the general district court ordered that seven of the seized animals be returned to her.

Root's animals were seized by County Animal Control Officers on December 13 and 15, 2004, pursuant to Va. Code Ann. § 3.1-796.115. That code section provided in pertinent part that:

> A. *Any . . . animal control officer may lawfully seize and impound any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.*

. . . .

> *Upon seizing or impounding an animal, the . . . animal control officer shall petition the general district court in the city or county wherein the animal is seized for a hearing.* The hearing shall be not more than ten business days from the date of the seizure of the animal. *The hearing shall be to determine whether the animal has been abandoned, has been cruelly treated, or has not been provided adequate care.*
>
> B. *The . . . animal control officer shall cause to be served upon the person with a right of property in the animal or the custodian of the animal notice of the hearing . . . .*

(Emphasis added.) Root was served with the petitions and a hearing was held in the general district court on December 22, 2004, which was within 10 business days from when the animals were seized, as required by Va. Code Ann. § 3.1-796.115(A).

The purpose of the hearing on December 22, 2004, was to determine whether the animals seized from Root had been abandoned, cruelly treated, or not provided with adequate care. Va. Code Ann. § 3.1-796.115(A). At the hearing on December 22, 2004, the Commonwealth's Attorney was required to prove the case *beyond a reasonable doubt* pursuant to Va. Code Ann. § 3.1-796.115(C). Va. Code Ann. § 3.1-796.115(D) (Supp. 2004) provided the general

district court with the following authority upon conclusion of the hearing:

> If the court determines that the animal has been neither abandoned, cruelly treated, nor deprived of adequate care, the animal shall be returned to the owner. *If the court determines that the animal has been abandoned, cruelly treated, or deprived of adequate care, then the court shall order that the animal be*: (i) sold by a local governing body; (ii) humanely destroyed, or disposed of by sale or gift to a federal agency, state-supported institution, agency of the Commonwealth, agency of another state, or a licensed federal dealer having its principal place of business located within the Commonwealth; (iii) delivered to any local humane society or shelter, or to any person who is a resident of the county or city where the animal is seized or an adjacent county or city in the Commonwealth and who will pay the required license fee, if any, on such animal; or (iv) delivered to the person with a right of property in the animal as provided in subsection E.

(Emphasis added.)

At the conclusion of the hearing on December 22, 2004, "the general district court ordered, *inter alia*, that seven (7) of the dogs be returned to Root and that the remaining ten (10)

animals be 'made available for adoption immediately.'" [J.A. at 7 ¶ 6.] As to the ten animals that were to be made available for adoption immediately, the general district court found, beyond a reasonable doubt, that such animals were abandoned, cruelly treated, or deprived of adequate care. As to the seven dogs that were to be returned to Root, the general district court did not find that such animals were abandoned, cruelly treated, or deprived of adequate care, and ordered those animals to be returned to Root. The general district court continued the matter until January 19, 2005, for a review hearing for the "court to determine, *inter alia*, 'if progress has been made with the adoptions . . . .'" *Id.*

A plain reading of Root's Complaint reveals that she received all of the process she was due under the Fourteenth Amendment. Root's animals were seized by Animal Control Officers on December 13, 2004, and December 15, 2004, pursuant to Va. Code Ann. § 3.1-796.115(A). [J.A. at 6-7, Compl. ¶¶ 4, 5.] As required by Va. Code Ann. § 3.1-796.115(B) (Supp. 2004), Root was served with the petitions and a hearing was held within 10 business days of the seizures, on December 22, 2004, as required by Va. Code Ann. § 3.1-796.115(A). [J.A. at 7, Compl. ¶ 6.] After the hearing, the general district court ordered "that seven (7) of the dogs be returned to Root and that the remaining ten (10) animals be 'made available for adoption immediately.'" [J.A. at 7, Compl. ¶ 6.]

When Root appealed the February 22, 2006, order to the circuit court, she had yet another opportunity to be heard and was, in fact, present with

counsel and heard on July 6, 2006, after which the circuit court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'" [J.A. at 8, Compl. ¶ 9.] Even assuming that Root did not knowingly and voluntarily waive her right to a jury trial as provided for in Va. Code Ann. § 3.1-796.115(C), it is well-established that violations of state law cannot provide the basis for a due process claim. *Clark v. Link*, 855 F.2d 156, 163 (4th Cir.1988).

Root makes the argument that because she exercised her right to appeal to the circuit court, her appeal voided the proceedings in the general district court which, therefore, led to her being deprived of due process by the County. In making this argument, Root cites *Cemmell v. Svea Fire and Life Insurance Co.*, 166 Va. 95, 184 S.E. 457 (1936), *Gravely v. Deeds*, 185 S.E. 662, 40 S.E.2d 175 (1946), *Gaskill v. Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965), and *Baker v. Elmendorf*, 271 Va. 474, 628 S.E.2d 358 (2006), in support of her argument that the finding of the general district court is a nullity and may not be considered in this case. Root's reliance on these cases is misplaced because none of these cases hold that upon an appeal to a circuit court from a general district court the entire proceedings in the general district court are a legal nullity. These cases specifically held that the entire proceedings in the general district court remain – only the judgment appealed from is annulled by the appeal.

In *Baker*, the Virginia Supreme Court held that "[w]henever a defendant exercises his rights under Code § 16.1-132 and a conviction in the general district court is appealed, *the fact of that conviction is*

not admissible in the appeal or in a subsequent civil proceeding." *Id.* at 479, 628 S.E.2d at 362 (emphasis added). The fact that the judgment of the general district court is not admissible in a subsequent appeal to circuit court or in a civil proceeding does not negate the fact that in this case Root had notice and an opportunity to be heard in the general district court and in fact, was heard on December 22, 2004.

Moreover, in reaching its decision in *Baker*, the Virginia Supreme Court relied on its earlier decision in *Santen v. Tuthill*, 265 Va. 492, 578 S.E.2d 788 (2003), where it recognized that it has:

> Draw[n] a distinction between a guilty plea, which forms the basis of a district court's judgment, and a defendant's statements made while testifying before the district court. *That testimony, unlike a guilty plea, is not "wiped out" by an appeal and is, therefore, admissible in the subsequent trial of the case.*

Santen, 265 S.E.2d at 497, 578 S.E.2d at 791. Thus, just as testimony before the general district court is not "wiped out" and is admissible in a *de novo* appeal to circuit court, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, in the general district court is also not "wiped out" by her appeal to the circuit court. Accordingly, Root's appeal to the circuit court could not and did not void the proceedings in the general district court, nor does it in any way vitiate the fact that she had been given notice and an opportunity to be heard.

Once the County seized Root's animals, it met its burden by petitioning the general district court for a hearing pursuant to Va. Code Ann. § 3.1-796.115(A) and giving Root notice of the same. [J.A. at 6, Compl. ¶¶ 4-5.] Such a hearing was held on December 22, 2004, at which time Root had the opportunity to contest and, in fact, did contest the basis for the retention of her animals. After the hearing, seven of Root's animals were returned to her. [J.A. at 7, Compl. ¶ 22.] Pursuant to the general district court's ruling on December 22, 2004, and order of January 4, 2005, the County made the remaining animals available for adoption "immediately." Under these facts, there was no due process violation, and the Fourth Circuit correctly affirmed the district court's dismissal of Count II. For the reasons set forth herein, the County respectfully prays that this Court deny Root's Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the County respectfully requests that the Court deny the petition.

Respectfully submitted,

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